Havi Logistic (M) Sdn Bhd v Pemungut Duti Setem

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–17–05 OF 2020
NOORIN BADARUDDIN J
5 NOVEMBER 2022

Revenue Law — Stamp duty — Assessment — Taxing authority charged ad valorem stamp duty on agreement between plaintiff and defendant for sale and purchase of defendant's assets and liabilities minus the goodwill — Whether the agreement itself was not an instrument of conveyance to attract such stamp duty — Whether taxing authority erred in applying s 21(1) and item 32 of First Schedule of Stamp Act 1949 ('SA') as the agreement itself did not transfer any legal or equitable interests in property — Whether taxing authority breached natural justice in not giving reasons for its decision — Whether agreement should have been adjudicated under item 4 of First Schedule of SA

The plaintiff formalised an agreement with a company ('MB') to buy over the latter's assets and liabilities in Malaysia for a total purchase price of about RM10.4m. The agreement expressly excluded from the purchase the goodwill of MB's business in Malaysia. The assets earmarked for purchase were computer software and hardware, fittings, renovations, plant, machinery and equipment. When the plaintiff sent the agreement to the defendant for stamp duty adjudication, the defendant levied an ad valorem duty of RM399,196 on the ground that the agreement fell under s 21(1) of the Stamp Act 1949 ('the SA') and item 32 of the First Schedule of the SA. The plaintiff paid the duty under protest and then appealed against the assessment arguing that the assessment should have been made under item 4 of the First Schedule of the SA. The defendant dismissed the appeal and maintained its earlier decision. In the instant appeal against the decision by way of case stated under s 39 of the SA, the plaintiff sought a declaration that the defendant's assessment of the duty was wrong and null and void. The sole issue in the instant proceedings was whether the duty should have been assessed under item 4 instead of item 32 of the First Schedule of the SA.

Held, allowing the appeal:

(1) The agreement could not be said to be an instrument which fell within the purview of s 21 and item 32 of the First Schedule of the SA. Goodwill was not part of the acquired assets and there was no landed property involved and no transfer of properties or interest legally or equitably

between the parties. Ad valorem duty could only be imposed when a property was legally or equitably transferred by an instrument (see paras 20–21).

(2) The respondent took the position that the agreement involved a conveyance of the interest in the property of MB to the plaintiff and thus fell under s 21 and item 32. But the agreement was merely a written contract for the plaintiff to buy over MB's assets and liabilities. The goodwill of MB's business in Malaysia was excluded from the transaction as MB would continue to remain in business in Malaysia (see paras 14 & 47).

(3) The defendant failed to specify which sub-item of item 32 of the First Schedule of the SA it was relying upon to tax the agreement. The defendant failed to provide any reason or basis in the assessment for treating the amount of consideration as the value of MB's goodwill. The plaintiff had proffered the reasons for their objection to the tax imposed but no reason was given by the defendant for its decision. This was a breach of natural justice in the sense the plaintiff had legitimate expectation that the defendant would take into account all circumstances of the matter. The principle was that in a taxing statute, the taxing authority must give reasons for the imposition of a tax. The burden of proof was on the defendant to prove that the agreement had to be assessed under item 32. Failure to provide reasons might lead to the inference that there were no good reasons for the decision that was made (see paras 31–33 & 35).

(4) The plaintiff had fulfilled all the requirements stipulated under item 4 of the First Schedule of the SA. The agreement clearly fell within the ambit of item 4 and, therefore, the stamp duty on the agreement should have been assessed under that item (see para 48).

[Bahasa Malaysia summary

Plaintif telah memuktamadkan perjanjian dengan sebuah syarikat ('MB') untuk membeli aset dan liabilitinya di Malaysia dengan jumlah harga belian kira-kira RM10.4 juta. Perjanjian tersebut secara jelas mengecualikan daripada pembelian nama baik perniagaan MB di Malaysia. Aset yang diperuntukkan untuk pembelian adalah perisian dan perkakasan komputer, kelengkapan, pengubahsuaian, loji, mesin dan peralatan. Apabila plaintif menghantar perjanjian kepada defendan untuk adjudikasi duti setem, defendan mengenakan duti ad valorem sebanyak RM399,196 atas alasan perjanjian tersebut jatuh di bawah s 21(1) Akta Setem 1949 ('AS') dan butiran 32 Jadual Pertama AS. Plaintif membayar duti tersebut dengan bantahan dan kemudian merayu terhadap taksiran tersebut dengan alasan bahawa taksiran tersebut sepatutnya dibuat di bawah butiran 4 Jadual Pertama AS. Defendan menolak rayuan dan mengekalkan keputusan awalnya. Dalam rayuan semasa terhadap

keputusan melalui kes yang dinyatakan di bawah s 39 AS, plaintif memohon satu deklarasi bahawa taksiran defendan terhadap duti tersebut adalah salah dan terbatal dan tidak sah. Satu-satunya isu dalam prosiding semasa adalah sama ada duti tersebut sepatutnya ditaksir di bawah butiran 4 dan bukannya butiran 32 Jadual Pertama AS.

Diputuskan, membenarkan rayuan:

(1) Perjanjian tersebut tidak boleh dikatakan sebagai instrumen yang termasuk dalam bidang kuasa s 21 dan butiran 32 Jadual Pertama AS. Nama baik bukan sebahagian daripada aset yang diperoleh dan tiada hartanah yang terlibat dan tiada pemindahan harta atau kepentingan secara sah atau saksama antara pihak. Duti ad valorem hanya boleh dikenakan apabila harta dipindahkan secara sah atau saksama melalui instrumen (lihat perenggan 20–21).

(2) Responden mengambil pendirian bahawa perjanjian tersebut melibatkan pemindahan kepentingan dalam harta MB kepada plaintif dan dengan itu jatuh di bawah s 21 dan perkara 32. Tetapi perjanjian tersebut hanyalah kontrak bertulis untuk plaintif membeli aset dan liability MB. Nama baik perniagaan MB di Malaysia dikecualikan daripada urus niaga kerana MB akan terus kekal dalam perniagaan di Malaysia (lihat perenggan 14 & 47).

(3) Defendan gagal untuk menyatakan sub-item yang mana dalam butiran 32 Jadual Pertama SA yang ia rujuk untuk mencukai perjanjian tersebut. Defendan gagal memberikan sebarang alasan atau asas dalam taksiran untuk menganggap jumlah balasan sebagai nilai nama baik MB. Plaintif telah mengemukakan alasan bantahan mereka terhadap cukai yang dikenakan tetapi tiada alasan diberikan oleh defendan untuk keputusannya. Ini adalah pelanggaran keadilan semula jadi dalam erti kata plaintif mempunyai jangkaan yang sah bahawa defendan akan mengambil kira semua keadaan perkara tersebut. Prinsipnya adalah dalam statut percukaian, otoriti percukaian mesti memberikan alasan untuk pengenaan cukai. Beban pembuktian terletak pada defendan untuk membuktikan bahawa perjanjian tersebut perlu dinilai di bawah perkara 32. Kegagalan untuk memberikan alasan mungkin membawa kepada kesimpulan bahawa tidak ada sebab yang kukuh untuk keputusan yang dibuat (lihat perenggan 31–33 & 35).

(4) Plaintif telah memenuhi semua keperluan yang ditetapkan di bawah butiran 4 Jadual Pertama SA. Perjanjian tersebut jelas termasuk dalam ruang lingkup perkara 4 dan, oleh itu, duti setem ke atas perjanjian tersebut sepatutnya ditaksir di bawah butiran tersebut (lihat perenggan 48).]

Cases referred to

Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fui [1984] 1 MLJ 169, FC (refd)
Allied Signal Inc & Anor v The Commissioner of Stamp Duties [1988] 1 MLJ 506 (refd)
Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449; [2013] 1 CLJ 24, FC (refd)
Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64, KBD (refd)
Cititower Sdn Bhd v Pemungut Duti Setem [2017] 11 MLJ 694, HC (refd)
Duport Steels Ltd and others v Sirs and others [1980] 1 All ER 529 (refd)
Ketua Pengarah Hasil Dalam Negeri v Rainforest Heights Sdn Bhd [2018] MLJU 2158, HC (refd)
Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors [2015] 6 MLJ 612; [2015] 9 CLJ 273, FC (refd)
MUI Finance Bhd v Menteri Kewangan, Malaysia [1993] MLJU 434; [1994] 2 CLJ 630, HC (refd)
Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal [2016] 2 MLJ 309; [2016] 2 SHLR 47, FC (refd)
Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors [2008] 2 MLJ 256, CA (refd)
Pemungut Duti Setem v BASF Services (Malaysia) Sdn Bhd [2009] 5 MLJ 348, CA (folld)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)
Public Prosecutor v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273, FC (refd)
Saujana Hotel Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ 213; (2011) MSTC 30-022, HC (refd)
Stanway Limited v Collector of Stamp Duties, Ipoh [1932] 1 LNS 77, SC (refd)
Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd [2017] MLJU 1193; [2017] 9 CLJ 185, FC (refd)
Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais [2021] 2 MLJ 120, CA (refd)
United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal [1991] 2 MLJ 559, SC (refd)
Wong Yee Boon v Gainvest Builders (M) Sdn Bhd [2020] 3 MLJ 571, FC (refd)

Legislation referred to

Stamp Act 1949 ss 2, 21, 21(5), 22, 22(2), (3), 39 First Schedule, items 4, 32, 32(a)

Saravana Kumar a/l Segaran (with Nur Hanina bt Mohd Azham and Aw Kai Xiang) (Raj, Ong & Yudistra) for the plaintiff.
Muazmir bin Mohd Yusof (with Nordiana Sham) (Revenue Counsel, Inland Revenue Board of Malaysia) for the defendant.

Noorin Badaruddin J:

[1] This is an appeal by way of case stated filed by the plaintiff under s 39 of the Stamp Act 1949 ('the SA') for a declaration that the notice of stamp duty assessment dated 15 March 2020 ('the assessment') issued by the respondent is erroneous, null and void.

FACTS

[2] On 6 February 2020 the plaintiff entered into an asset purchase agreement ('the agreement') with Martin-Brower Malaysia Co Sdn Bhd ('MB Malaysia') where the plaintiff agreed to acquire the business assets and liabilities of MB Malaysia. The details of the assets and liabilities acquired are set out in Schedule 1 and Schedule 3 of the agreement. Among others, the assets and liabilities acquired are MB Malaysia's fixed assets such as computer software, computer hardware, fittings, renovation, plant, machinery and equipment as well as liabilities under business contracts.

[3] The purchase price for the acquisition stated in Schedule 1 of the agreement amounts to USD2,491,491.55 equivalent to RM10,378,806.35 at the material time.

[4] The list of excluded assets are listed under Schedule 2 of the agreement. Among others, the assets excluded in the transaction is the 'goodwill of the Malaysia Business' of MB Malaysia.

[5] The plaintiff through its's solicitors made an application for adjudication of the agreement through e-stamps on 5 March 2020.

[6] The respondent adjudicated the agreement with ad valorem duty amounted to RM399,196 with the view that the agreement falls within the ambit of s 21(1) of the SA and item 32(a), First Schedule of the SA which forms the basis of the impugned assessment.

[7] The plaintiff made the payment of RM399,196 and via letter of 10 April 2020, the plaintiff's solicitor informed the respondent that the payment was made under objection based on s 38A of the SA.

[8] On 11 April 2020, the plaintiff made an application to appeal against the assessment raised by the respondent with the view that the agreement should be assessed based on item 4, First Schedule of the SA.

[9] The respondent rejected the plaintiff's appeal and maintained its decision via letter dated 13 April 2020.

[10] Aggrieved with the respondent's decision, the present appeal was filed by the plaintiff.

THE ISSUE

[11] The sole issue to be determined herein is whether the agreement is to be assessed under items 4 or 32, First Schedule of the SA.

FINDINGS

[12] Items 4 and 32, First Schedule of the SA read as follows:

> FIRST SCHEDULE
>
> [Section 4]
>
> INSTRUMENTS CHARGEABLE WITH STAMP DUTY
>
> 4 AGREEMENT OR MEMORANDUM OF AGREEMENT made under hand only, and not otherwise specially charged with any duty, whether the same is only evidence of a contract or obligatory on the parties from its being a written instrument.
>
> 32 CONVEYANCE, ASSIGNMENT, TRANSFER OR ABSOLUTE BILL OF SALE:
>
> (a) On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph (c))
>
> (b) On sale of any stock, shares or marketable securities, to be computed on the price or value thereof on the date of transfer, whichever is the greater —
>
> For every RM1,000 or fractional part of RM1,000
>
> (c) On the absolute sale of any accounts receivables or book debts to a bank, merchant bank, or finance company licensed under the Banking and Financial Institutions Act 1989 or under the Islamic Banking Act 1983 or a scheduled institution as defined under section 2 of the Banking and Financial Institutions Act 1989*, pursuant to a factoring agreement*
>
> (d) Of any property by way of security or any security other than a marketable security
>
> (e) Of any property as above where the transaction is between trustees and where —
>
> (i) the beneficial interest in the property passes
>
> (ii) the beneficial interest in the property does not pass

A
(f) Of any property, for the purpose of effectuating the appointment of a new trustee or the retirement of a trustee although no new trustee is appointed

(g) Of any property by way of settlement

(h) Of any property by way of gift (whether by way of voluntary disposition or otherwise)
B

(i) Of any kind not otherwise specially charged with duty

C
[13] The instrument in question herein is the agreement between the plaintiff and MB Malaysia which is a written contract for the sale and purchase of business excluding the goodwill (see section 2 of the agreement which stipulates that the goodwill of the MB Malaysia business in Malaysia is excluded from the transaction).

D
[14] Having conceded that goodwill of MB Malaysia is excluded from the transaction, the respondent takes the position that the agreement involves conveyance on the interest on property of MB Malaysia to the plaintiff and thus, falls under s 21 and item 32, First Schedule of the SA.

E
[15] Section 21 of the SA speaks about 'Certain contracts to be chargeable as conveyances on sale'.

[16] Section 21 of the SA:

21 Certain contracts to be chargeable as conveyances on sale
F

(1) Any contract or agreement made in Malaysia under seal or under hand only, *for the sale of any equitable estate or interest in any property whatsoever*, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of Malaysia, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold.
G

(2) Where the purchaser has paid the said ad valorem duty and, before having obtained conveyance or transfer of the property, enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the ad valorem duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten ringgit.
H
I

(3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the Collector, upon application,

either shall denote the payment of the ad valorem duty upon the conveyance or transfer or shall transfer the ad valorem duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped. (Emphasis added.)

[17] Section 2 of the SA defines *'conveyance of sale'* as follows:

'conveyance on sale' includes every instrument and every decree or order of any Court, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction;

[18] Under the same section, 'Property' is defined as:

'property' includes movable or immovable property and any estate or interest in any property moveable or immovable, whether in possession, reversion, remainder or contingency, and any debt, and anything in action, and any other right or interest in the nature of property which is capable of being disposed of and has a value in it.

[19] The agreement is a 'Business Contract' between MB Malaysia and the plaintiff for the provision of logistics and distribution services to McDonald's Malaysia (as set out in Schedule 3 of the agreement including but not limited to, lease agreements and tenancy agreements). The consideration paid by the plaintiff is as per the list of assets stated in the Schedule of the agreement which are as follows:

(i) Acquired Assets

  (a) Computer software;

  (b) Computer hardware;

  (c) Fittings;

  (d) Renovations; and

  (e) Plant, machinery and equipment

(ii) Inventory.

[20] Based on the agreement, the fact that goodwill is not part of the 'Acquired Assets' and that there is no landed property involved, it is of the considered view that the business contract between MB Malaysia and the plaintiff does not involve transfer of properties or interest legally or equitably between the two parties. As such, the agreement cannot be said to be an instrument which falls within the purview of s 21 and item 32, First Schedule of the SA.

[21] Ad valorem duty can only be imposed when a property is legally or equitably transferred by an instrument. This court takes guidance from the

Malaysian Stamp Duty Handbook (6th Ed) by Dr Arjunan Subramaniam, a tax expert wherein the learned author had explained the scope and meaning of 'conveyance' under s 2 of the SA, in Chapter 4 of the Handbook as follows:

> Conveyance: Scope and Meaning
>
> [4.01] Section 2 defines conveyance on sale as follows: 'conveyance on sale' includes every instrument and every decree or order of any Court whereby any property or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction.
>
> [4.02] In the case of *Commissioner of Inland Revenue v Angus* (1889) 23 QBD 579 the distinction between a contract and a conveyance was considered. The facts in that case as outlined by Justice Thorne, acting CJ, in *Stanway Limited v Collector of Stamp Duties, Ipoh* [1932] 1 LNS 77, were as follows:
>
> > ... an agreement had been made between the liquidators of a company and a new company for the sale and purchase of the assets of the company in liquidation and included among those assets the *goodwill* of the old company. The revenue authorities claimed that the instrument evidencing the sale was chargeable with stamp duty as a conveyance on sale ...
> >
> > ... the contention as regards goodwill was that this became vested in the purchasers without any further assurance by virtue of the instrument the subject of debate, and, therefore, Government was entitled to charge ad valorem stamp duty. The Commissioners under the Stamp Act held that the instrument was chargeable as a conveyance or transfer on sale upon such a proportion of the purchase consideration as was allocated to goodwill.
>
> [4.03] *Where a property is legally or equitably transferred by an instrument the stamp duty is ad valorem, but if an instrument does not transfer property legally or equitably then it is merely a contract and no ad valorem duty is payable*. In *Angus,* the matter was put this way:
>
> > If the property is legally or equitably transferred by the instrument to which a stamp ought to be affixed, then, no doubt, ad valorem duty ought to be paid upon an agreement but if by an instrument no property is legally or equitably transferred, then it falls within the ordinary denomination of deeds and is simply to be stamped with an ordinary stamp, and no ad valorem duty would be payable until after the conveyance was actually made in pursuance of the agreement. The question is, whether this agreement can be said to convey or transfer any legal or equitable interest.
>
> [4.04] The instrument in *Angus* was held to be an agreement not a conveyance on sale because everything was not completed at the time when the instrument was executed. In *Angus*, the completion date was a future date. (Emphasis added.)

[22] The learned author in the above Handbook continued and stated as follows:

Contracts for sale of equitable estate or interest — Section 21

[6.43] Section 21 excludes the sales of goods or wares from ad valorem duty and so if these items are included in the sale of an interest, the price of the goods and wares is to be deducted from the consideration. But the consideration for goodwill and book debts is not excluded by section 21.

[23] In *Stanway Limited v Collector of Stamp Duties, Ipoh* [1932] 1 LNS 77, the case cited by the learned author in the above, the material terms of the agreement was that the sale was to be completed when the consideration was to be paid and satisfied and the vendors were to execute and do all such assurances and things as should be reasonably required by the purchasers for the vesting in them of the said premises so sold. Upon the presentation of the agreement, the Collector of Stamp Duty in that case was of the opinion that under the provisions of the Stamp Enactment ad valorem duty was payable on the total consideration and an amount of that duty was assessed. Thorne Acting CJ held as follows:

As I read it, the contention as regards goodwill was that this became vested in the purchasers without any further assurance by virtue of the instrument the subject of debate, and, therefore, Government was entitled to charge ad valorem stamp duty.

...

With regard to the contention raised by the Government here as to the operation of this agreement, I would refer to the passage in the judgment of Hawkins J, at the bottom of page 582, where he says:

If the property is legally or equitably transferred by the instrument to which a stamp ought to be affixed, then, no doubt, an ad valorem duty ought to be paid upon an agreement, but if by an instrument no property is legally or equitably transferred, then it falls within the ordinary denomination of deeds and is simply to be stamped with an ordinary stamp, and no ad valorem duty would be payable until after the conveyance was actually made in pursuance of the agreement. The question is, whether this agreement can be said to convey or transfer any legal or equitable interest.

... ot is quite clear that this contract of sale contemplates a completion of purchase, acts remained to be done, and instruments remained to be executed, in order to carry the agreement into effect This instrument is a concluded agreement between the parties, and is not a conveyance on sale, and further assurances are necessary in order that it may become a completed purchase. The practical test, as I have said, applied to a question of this kind is to ask oneself the question as to what would happen if either of the parties failed to complete the purchase. The answer, as I have pointed out, is that the effect and operation of this document is to create in the purchasers a right of action ex contractu. I am of the opinion, therefore, that the decision of the Collector, of the Chief Revenue Authority, and the Judge in the Court below are all wrong, and that this instrument should be stamped under Schedule A of the Stamp Enactment with a 25 cents stamp. (Emphasis added.)

[24] In the same Handbook, the learned author further cited the Singapore case of *Allied Signal Inc & Anor v The Commissioner of Stamp Duties* [1988] 1 MLJ 506 where the provision of their Stamp Duties Act (specifically s 22 of the Stamp Duties Act) is in pari materia with the Malaysian SA. In that case, there were three instruments:

(a) Agreement I between BP Singapore Pte Ltd and Allied Signal for the purchase of interests in a building;

(b) Agreement II between Allied Signal and Norplex whereby Norplex took the interests purchase by Allied Signal under Agreement 1; and

(c) a deed of assignment between BP and Norplex, under which BP assigned its interest under Agreement I to Norplex. The assignor was BP. The original purchaser was Allied Signal and the assignee was Norplex.

[25] The Commissioner of Stamps in that case was of the view that the transactions ought to take as follows:

(a) Agreement II should take ad valorem duty;

(b) The assignment to Norplex should take ad valorem duty; and

(c) Agreement II is not liable to duty under s 21(5) of the Stamp Duties Act.

[26] However, the Singapore High Court through the judgment of Grimberg JC held that:

(a) the assignment was not chargeable to ad valorem duty as such have already been assessed under agreement 1 and thus entitled to the benefit under s 22(3) of the Stamp Duties Act;

(b) Agreement 1 was correctly stamped with ad valorem duty; and

(c) Agreement II was not chargeable to ad valorem duty, not being an agreement falling under s 22(2) of the Stamp Duties Act.

[27] It is clear from the above authorities that s 22(2) of the Stamp Duties Act (which is in pari materia with our s 21 of the SA) operates only when there is a transfer of property legally or equitably or a sale of interest in the property.

[28] In the case of *Cititower Sdn Bhd v Pemungut Duti Setem* [2017] 11 MLJ 694, although the High Court did not dwell upon s 21 of the SA, the agreement therein was similar ie a sale of business agreement which includes sale of assets and liabilities. In that case, the plaintiff argued that the sale business agreement is exempted from stamp duty under s 15(1) of the SA whilst the Stamp Duty Commissioner as the defendant argued that the same agreement ought to be imposed with ad valorem duty under s 21 of the SA wherein items liable to duty are goodwill, receivables and deposit and the duty

would be calculated based on item 32(a) First Schedule of the SA. Hanipah Farikullah J (as Her Ladyship then was) in dismissing the defendant's contention concluded that:

> [20] ... there is no basis in law for the Memorandum of Transfer to be assessed under ad valorem duty under Item 32, Schedule 1 of the SA ...

[29] It must be noted that in *Cititower Sdn Bhd* goodwill was contested and yet the High Court was of the view that s 21 of the SA was inapplicable. In the present matter it is clear and conceded that there is no transfer or conveyance of goodwill. As such, it cannot be said that there are properties legally or equitably transferred to or acquired by the plaintiff from MB Malaysia.

[30] The respondent further contends that the agreement shows that not only the assets are transferred but it contains liability that will be assumed by the plaintiff and as such there is indeed an element of business transfer and the agreement therefore falls under s 21 of the SA. This argument is misconceived. A plain reading of s 21 of the SA does not state about liability. It merely states 'sale of any equitable estate or interest in any property'. Further, in the case of *Cititower Sdn Bhd*, liabilities are included in the sale business agreement therein but the High Court found that the agreement was not chargeable under item 32(a) or (b), First Schedule of the SA. The respondent for that matter fails to produce any authorities to support that s 21 of the SA extend to acquisition of liabilities.

[31] In wanting to bring the Agreement to tax under item 32, First Schedule of the SA, the Defendant fails to specify which sub-item of item 32, First Schedule of the SA that they are invoking. The respondent fails to provide any reasons or basis in the assessment for treating the amount of consideration as the value of MB Malaysia's goodwill. The plaintiff had at the very early stage proffered the reasons of their objection to the respondent via letter dated 11 April 2020 and yet no reasons were given by the sefendant.

[32] Item 32, First Schedule of the SA has many sub-items with different categories and rates prescribed. The principle is that in taxing statute once the tax authority subject the taxpayer to tax, they must give reasons as to the imposition of the tax. In *Ketua Pengarah Hasil Dalam Negeri v Rainforest Heights Sdn Bhd* [2018] MLJU 2158, Nordin Hassan J (as His Lordship then was) explained:

> [10] In this regard, I am in agreement, with the-reasoning by the judge in the case of *Port Dickson Power Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] MSTC 30–045 which states:
>
> > (a) this thrust of the applicant's case has been concerned with the issue surroundaing the proper, or rather the improper, invocation of the s 140 of the

ITA, 1967 by the respondent;

(b) The first of the concerns had related to the fact that *the notice of additional assessment issued by the respondent was bad because it had not specified or particularized which of the limbs under that subsection the respondent had resorted to.* The second one has been that the respondent had not shown his ground for believing that was necessary, according to the learned counsel for the applicant, for the respondent to express and disclose.

(c) ln fact, the first and the second grounds are quite well connected. To my mind, the ability of the respondent to ascertain his grounds for entertaining the necessary belief would greatly assist him in identifying under which particular paragraph under s 140(1) of the ITA that the applicant had committed the impugned act of understating his assessments for the years 2004–2005.

[11] Further, *by specifying the limb or limbs under sub-s 140(1) which the appellant is relying in varying the said transaction, it gives the respondent the information as to the reason for the invocation of the said sub-section. Consequently, the respondent can answer effectively the said effect of the transaction which the appellant has reason to believe in invoking the said sub-s 140(1).* (Emphasis added.)

[33] The burden of proof rests strictly on the respondent to prove that the agreement should be assessed under item 32, First Schedule of the SA. There is judicial dicta that failure to provide reasons may lead to the inference that there are no good reasons for the decisions made by the public authorities as decided by the Court of Appeal in *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [2021] 2 MLJ 120. In that case the Court of Appeal held:

We are of the considered view that on the facts and circumstances of this case, the respondent has a duty to give reasons for its decision. We find support for the above view in the foliowing authorities. In the recent Federal Court case of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2018] 2 MLJ 590 ('Kesatuan Pekerja-Pekerja') one of the issues raised was whether in exercise of his powers under s 12(2) of the Trade Union's Act 1959, the failure of the Director General of Trade Unions ('DG% to give any reasons for any decision made under the guise of exercising his absolute discretion offends the principle of natural justice. Balia Yusoff Wahi JCA (as he then was) delivering the judgment of the Federal Court had stated as follows:

[86] *It is also settled public law principle and principle of natural justice that a public decision-making body is under a duty to give reasons for its decision. Indeed, a reasoned decision can be an additional constituent of the concept of fairness. (Rohana bt Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193*). The giving of reason is also one of the fundamentals of good administration.*

[87] *The absence of any provisions in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reasons unless that very statute specifies that no reasons needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to*

the interested parties or the public at large.

[88] In a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then perhaps the need to give reasons by the decision maker may not arise. The circumstances arising in the particular case may by implication, demand the imposition of a duty to give reasons. Lord Mustill in the House of Lords case of*Doody v Secretary of State for the Home Department and other appeals* [1993] 3 All ER 92 said ... (Emphasis added.)

[34] The same legal principle was highlighted in *MUI Finance Bhd v Menteri Kewangan, Malaysia* [1993] MLJU 434; [1994] 2 CLJ 630. In that case the court stated:

In view of my finding, the next question for me to consider was whether the court had the power to make an order of certiorari to quash the order made by the respondent. In *Padfield & Ors v Minister of Agriculture, Fisheries and Food & Ors* [1968] 1 All ER 695 under para (ii), it is clearly stated:

The fact that a Minister gave no reasons for his decision, whether or not to exercise a discretionary power conferred on him by statute would not prevent the Court from reaching a conclusion in a proper case that a prerogative order should issue.

Padfield's case was quoted with approval by our Supreme Court in *Minister of Labour, Malaysia v National Union of Journalists, Malaysia & Another Appeal* [1991] MLJ 27. In *Jain's Administrative Law of Malaysia and Singapore* (2nd Ed) at p 382, the learned author under the heading 'Acting Mechanically' said:

An authority vested with discretion has to apply its mind to the facts and circumstances of the case before taking an action. If it acts mechanically without applying its mind, its act will be ultra vires. This principle is illustrated by *Emperor v Sibnath Banerjee* AIR 1945 PC 156. (Emphasis added.)

[35] The SA is clear. Once the taxpayer executes a document, he must bring it for adjudication. This is what the plaintiff did. The plaintiff had complied with the law and gave reasons as to their computations. The plaintiff has discharged a higher burden placed on them. On the other hand, the respondent made decision without giving reasons. There is a breach of natural justice in the sense that the plaintiff has legitimate expectation that the respondent will take into account circumstances of the matters.

[36] Since 'Agreement' is not defined in the SA, the terms therein must be defined in its ordinary sense and not limited or restricted in anyway as enunciated in the Federal Court's case of *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309; [2016] 2 SHLR 47. The Federal Court stated:

[19] For the purpose of determining the meaning of qualification in s 59(1), I am inclined to accept the submission of learned senior federal counsel that *in absence of*

A *the definition of qualification in Act 505 or in the Interpretation Acts 1948 and 1967, the plain and ordinary meaning of the word is to be used, as decided in Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69. The dictionary meaning of word qualification are enumerated in the written submission of learned senior federal counsel. First, the meaning found in the *Concise Oxford English Dictionary* (11th Ed), which states as this ...

B

[37] The Federal Court in *Wong Yee Boon v Gainvest Builders (M) Sdn Bhd* [2020] 3 MLJ 571 had held that:

C Bearing in mind that it is a written agreement the rule of interpretation of it, is well settled. Once a contract is reduced to writing it must be read within its four corners without more.

[38] In *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256, the Court of Appeal held the following:

D For the purposes of construction of contracts, *the intention of the parties is the meaning of the words they have used.* In *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683, Lord Simon of Glaisdale approved the following passage in *Norton on Deeds* (2nd Ed) at p 50:

E the question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?'... it being a presumption *juris et de jure* ... that the parties intended to say that which they have said.

[39] In addition, the Court of Appeal also held in *Petroleum Nasional Bhd v* F *Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 that:

It is a cardinal rule in the interpretation of documents that the intention of the parties must be gathered from the written agreement itself. For the construction of a written agreement the established doctrine is firstly, to exclude evidence of negotiations leading up to the contract on the ground that it is only the formal agreement which G records a consensus and as such evidence of negotiations is unhelpful; and secondly, to exclude evidence of the parties' subjective interpretations so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. (Emphasis added.)

H

[40] Likewise, legislation must be understood first in accordance with its plain meaning. The question to ask is what is the natural or ordinary meaning of the word or phrase in its context in the statute? (see: *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449; [2013] 1 CLJ 24 and I *Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd* [2017] MLJU 1193; [2017] 9 CLJ 185).

[41] Item 4 of the First Schedule of the SA is plain and clear. It should be given its literal and natural meaning (see: *Affin Credit (Malaysia) Sdn Bhd v Yap*

Yuen Fui [1984] 1 MLJ 169; *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 and *Duport Steels Ltd and others v Sirs and others* [1980] 1 All ER 529). A

[42] This principle of strict interpretation of taxing statutes is settled. In *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 the court held: B

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ... C

[43] In *Saujana Hotel Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 9 MLJ 213; (2011) MSTC 30–022, the High Court had held that: D

> [14] The legislature's intent should be ascertained primarily from the plain language of the statute. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Once the legislature has made a choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.
>
> [15] *Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. The court must apply those words according to their literal meaning. What a legislature says in the text of a statute is considered the best evidence of the legislature intent or will. It is not the court's place to change the meaning of a clear and unambiguous statute.* E
>
> [16] *Where the words of statute is clearly conveyed there is no scope to innovate or take upon itself the task of amending or altering statutory provisions* ... F

[44] In the same vein, the Court of Appeal in *Pemungut Duti Setem v BASF Services (Malaysia) Sdn Bhd* [2009] 5 MLJ 348 held that one must look at the instruments and not at the transactions in construing the SA. The position had been adopted later by the Federal Court. The following paragraphs in the judgment are instructive: G

> [38] *Suffice for me to say that in construing the Stamp Act 1949 (Act 378) one must look at the instruments and not at the transactions.* The reason is quite simple. *Under the Stamp Act 1949 (Act 378), stamp duty is imposed on an instrument and not on a transaction.* Thus, the instrument here would refer to the 'Purchase, Sale, Development and Infrastructure Agreement' which is chargeable with stamp duty under item 32(a) of the First Schedule to the Stamp Act 1949 (Act 378) and the date for determining the market value of the property being transferred according to s 12A(b) of the Stamp Act 1949 (Act 378) shall be the date of execution of the said agreement which was on 11 October 1997 and which would include all the three components. H I
>
> [39] *The Stamp Act 1949 (Act 378) and the First Schedule thereto must be construed according to the intention expressed in the Act itself. It must be borne in mind that the*

function of the court is to interpret an Act 'according to the intent of them that made it and the intention must be deduced from the language used' (per Lord Parker CJ in *Capper & Anor v Baldwin* [1965] 2 QB 53 at p 61). In the same vein, Donaldson J, in *Corocraft Ltd & Anor v Pan American Airways Inc* [1969] 1 QB 616 at p 638 aptly said that, 'The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments'. Of significance is the following phrase. That, *'Where the language of the Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature'* ... (Emphasis added.)

[45] It is also trite law that in the event of any ambiguity in the tax statute, it should favour the taxpayer. This was stated by the Federal Court in *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors* [2015] 6 MLJ 612; [2015] 9 CLJ 273 in the followings excerpts of the judgment:

[43] A levy is a tax and in this case was created by the Act It is well settled that the language of a statute imposing a tax, duty, charge or levy must be strictly construed, and with no intendment permitted. Words must be given their ordinary meaning. Nothing is to be read in, and nothing is to be implied, and once that meaning is clear due regard must be given to them. Any ambiguity detected must lean in favour of the taxpayer charged with paying the tax, duty, charge or levy (*Mangin v Inland Revenue Commissioner* [1971] AC 739; *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64).

[46] The same principles were adopted and illustrated by the Federal Court in a stamp duty case of *United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal* [1991] 2 MLJ 559 as follows:

The Stamp Act 1949, is an Act relating to stamp duties and, as Lord Tenterden had stated in Tomkins v Ashby (1827) 108 ER 551*, 'Statutes imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the legislature'.* The rules of construction of documents for stamp duty purposes and of stamp duty legislation are well summarised in the following passages from *Sergeant and Sims Stamp Duties* (9th Ed) p 18:

(a) general rule of construction of charge:

It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language: Denn & Manifold v Diamond (1825) 4 B&C 243*, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous: Daines v Heath* (1847) 3 CB 938. The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it, and no intendment can be made in favour of the liability: *Phillips v Morrison* (1844) 13 LJ Ex 212 *and R v Winstanley* (1831) 1 Cr&J 434.

(b) ambiguity:

If the statute is so indefinite and uncertain that it can be treated in two ways and the

true construction of it is open to two views, one more favourable to the Crown and the other to the subject, then the latter construction should be adopted: Clifford v IRC [1896] 2 QB 187, approved and followed in *Hennell v IRC* [1933] 1 KB 415 (CA). In other words, the subject, and not the Crown, is entitled to the benefit of the doubt: *R v Winstanley* (1831) 1 Cr&J 434. (Emphasis added.)

[47] The facts are clear. The agreement is a mere written contract for the purchase of business between the plaintiff and MB Malaysia and the consideration paid by the plaintiff is for the list of assets stated in the agreement. The agreement clearly stipulates that the goodwill of MB Malaysia's business in Malaysia is excluded from the transaction and that MB Malaysia remains in business in Malaysia. The agreement is not a sham arrangement. Nowhere can it be shown that the valuation of the assets purchased by the plaintiff is inflated.

[48] On a plain reading of Item 4, First Schedule of the SA, this court finds that the plaintiff has fulfilled all the requirements stipulated thereunder. The agreement clearly fell within the ambit of item 4, First Schedule of the SA. Therefore, the stamp duty on the agreement should be assessed under the same item.

CONCLUSION

[49] Premised on the reasons alluded to in the above, the plaintiff's application was allowed with costs.

Appeal allowed.

Reported by Ashok Kumar